No. 84-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, and ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, and GLENDIS HAMBRICK, INDIVIDUALLY AND AS OFFICERS OF THE CHICAGO TEACHERS UNION,

Petitioners,

v.

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHERLENE HOLMES, EDNA ROSE MCCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

PETITIONERS' REPLY BRIEF

In our petition, we urged the Court to vacate the judgment of the court of appeals and to remand this case for reconsideration in light of the subsequent summary decisions in *Jibson v. White Cloud Education Ass'n*, —— U.S. ——, 105 S.Ct. 236 (1984), and *Kempner v. Dearborn Local 2077*, —— U.S. ——, 105 S.Ct. 316 (1984), both of which sustained the constitutionality of procedures for effecting proportionate share payments which procedures were *less exacting* than those mandated by the court below. Respondents seek to wish away *Jibson* and *Kempner* in all the following ways. Respondents contend that remanding this case in light of those intervening precedents "would manifestly waste judicial resources" because, according to respondents, if this case were remanded, "the Court of Appeals would simply distinguish *Jibson* and *Kempner* on one or more of many alternative grounds, and then reinstate its earlier opinion." Resp. Br. at 10. The appellate court would do so, respondents maintain, because "whatever this Court's reasons for summarily dismissing *Jibson* and *Kempner*, they could not have been the reasons [petitioners] advance unless this Court meant by those dismissals *sub silentio* also to overrule both *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)] and *Ellis* [*v. BRAC*, —— U.S. ——, 104 S.Ct. 1883 (1984)], and "no sensible Court of Appeals would hold that the mere summary dismissals in *Jibson* and *Kempner* have radically transmogrified the legal principles this Court so painstakingly explained and applied in its plenary decisions in *Abood* and *Ellis*." Resp. Br. at 9-10. As we proceed to show, respondents' evasions cannot withstand scrutiny.

First, there is no mystery, nor even any room for doubt, as to the holding of *Jibson* and *Kempner*. In both cases the unions, to borrow the rhetoric respondents employ in their statement of the case here, "unilaterally informed the Board [of Education] of the amount of the payments demanded [from employees whom the union

represented but who had not joined the union]." In both cases "the Board deducted the proportionate-share payments, and transferred the monies to [the union], without even attempting to verify the propriety of its actions." In both cases, individuals who wished to challenge the amount of the required payments were obligated to "either avail [them]selves of [the] 'internal union review' and arbitration scheme . . . or sue [the union]." Resp. Br. at 3-4. In both cases, objecting fee payers challenged these procedures, and the state courts rejected the challenges. In both cases the objectors appealed to this Court raising the question whether the procedure was unconstitutional because it "licenses the unions—prior to any adjudication of the amount of a constitutionally permissible agency shop fee—to spend a dissenting employee's compulsory fee." *See* CTU Pet. for Cert. at 10, 12 (quoting *Jibson* and *Kempner* jurisdictional statements). And in both cases this Court dismissed the appeals for want of a substantial federal question.

In sum, *Jibson* and *Kempner* necessarily establish, contrary to the holding below, that the Constitution permits a union to collect and expend proportionate-share payments from objecting fee payers prior to a state adjudication as to the proper amount of the payment, at least where, as was true in *Jibson* and *Kempner*, the union in determining the amount of the fee makes a reduction of dues based on a "good faith application of current case law." While respondents accuse us of offering a "self-interested interpretation of the questions presented in the appeal[s]," in *Jibson* and *Kempner*, Resp. Br. at 10, our "interpretation" of those decisions is based upon the text of the opinions of the Michigan courts in those cases and the text of the questions presented by the appellants' jurisdictional statements, all of which we quoted in our petition. Respondents, in contrast, conveniently ignore all these source materials.

Second, respondents are wrong in suggesting that *Abood* and *Ellis* require a different reading of *Jibson*

and *Kempner* (even assuming, *arguendo*, that the latter cases were susceptible of some alternative interpretation). To the contrary, *Abood* did not reach the precise procedural due process question at issue here, as even the court below acknowledged, *see* Pet. App. at A-8. And *Ellis*, which did reach that question albeit in a different context, supports the results later reached in *Jibson* and *Kempner*.

In *Ellis* objecting fee payers were required to pay up-front to the union the same amount as union members paid in dues; the union later rebated to the objectors the portion of their payments attributable to activities which the objectors could not be compelled to support. The Court held that this "pure rebate approach is inadequate." 104 S.Ct. at 1890. But the *Ellis* Court based its rejection of that approach on the very fact that there are "readily available alternatives, such as advanced reduction of dues and/or interest-bearing escrow accounts [into which some or all of an objector's payments are deposited *pendente lite*]." *Id.* The Court explained that in light of the "*acceptable alternatives*," the pure rebate approach was impermissible. *Id.* (emphasis added).

Ellis thus supports the precise procedure the court below invalidated which includes *both* an advanced reduction and an escrow. *See* Pet. App. A-1, A-51. Plainly, neither *Abood* nor *Ellis* provide any basis for doubting what is in any event clear from *Jibson* and *Kempner*: that the latter cases hold that under the Constitution an objector may be required to make proportionate share payments of a reduced amount of dues before a final adjudication is rendered with respect to the objector's challenge to the amount of the reduction.[1]

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[1] Respondents suggest that this rule is somehow inconsistent with due process principles; the fallacy of that suggestion is revealed by the fact that respondents have not cited even a single due process decision to support their version of the Due Process Clause. *See also* Pet. at 17-21.

Third, respondents err in suggesting that there is any principled basis for distinguishing *Jibson* and *Kempner* from the instant case. Respondents suggest that *Jibson* is distinguishable because there "the employee could 'immediately file suit for declaratory judgment' " and could " 'quickly move for a resolution of the issue and a vindication of his constitutional rights,' " Resp. Br. at 11, *quoting White Cloud Education Association v. Board of Education*, 101 Mich. App. 309, 300 N.W. 2d 551, 555 (1980), whereas here, according to respondents, there is not "any guarantee of an expedited hearing on the merits." But Illinois, too, has a declaratory judgment procedure, Ill. Rev. Stat., Chap. 110, § 2-701 (1983), and there is no reason to assume that the Illinois courts would be dilatory in adjudicating constitutional challenges brought by objecting fee payers.[2] And the *Jibson* court in any event did not "*guarantee*" expedition; all that the court there said was that the objetcors could "*move*" for expedition. Thus respondents offer no distinction of *Jibson* at all.

Respondents' effort to brush *Kempner* aside is equally superficial. Respondents say that "the internal union exhaustion-requirement upheld in that case was imposed as a prerequisite to the filing of an administrative complaint by a dissenting employee, not as a bar to judicial relief." Resp. Br. 10. But respondents do not even offer a theory as to why an exhaustion requirement is consistent with due process in one instance and not the other.

Fourth and finally, insofar as respondents suggest that, on remand, *Jibson* and *Kempner* would be less than fully binding on the appellate court, respondents are mistaken. Although this Court has held that in applying the rule of *stare decisis* the Court itself will feel freer to overrule summary decisions than plenary decisions, the Court also has made it clear that, unless and until a summary decision is overturned by this Court, the summary decision constitutes the law and is binding on the lower courts just as much as an opinion rendered after plenary consideration. *See, e.g., Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). *Jibson* and *Kempner* thus constitute the law that must be applied by the lower courts. And because the court of appeals in this case has not had the opportunity to consider the impact of those decisions, this case should be remanded to the Seventh Circuit for reconsideration.

[2] Such an assumption would be especially unwarranted here since respondents elected not to tender their claims to the Illinois courts for resolution.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Court should issue a writ of certiorari in this case.

Respectfully submitted,

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